A Guide to Mental Capacity in Scotland

Mental Health and Wellbeing in later life
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Everyone who is over 16 years old in Scotland is presumed to have ‘legal capacity’ – to make decisions for themselves unless a legal decision is made that they do not have this capacity.

If someone does not have, or loses capacity there are laws in place to protect them, and to guide the actions of people who wish to help them.

This booklet looks at what ‘mental capacity’ means in Scotland, how the law surrounding it works in practice and where to get advice.
**What is ‘mental capacity’?**

Mental capacity refers to our ability to make decisions for ourselves and to act on them.

Some people have limited capacity all their lives if they have a significant learning disability. Others, for example, have diminishing capacity caused by a progressive illness such as dementia, or someone could suddenly lose capacity, perhaps after a stroke or brain injury.

In many cases, someone may be mostly managing well but find it hard to make decisions or take the necessary action about specific things.

Most people first hear the term ‘mental capacity’ used when someone they know is in hospital, and the doctor has assessed that they ‘lack capacity’ as a result of their illness or injury.

Mental capacity can change both in the short term and long term. Someone’s ability to make decisions can vary from day to day and hour to hour.

Many people believe that if they were to lose capacity, their husband, wife, partner, civil partner or next of kin could make decisions on their behalf. Nobody has an automatic right to make a decision about someone else’s life if they lose the capacity to do this for themselves.
Common problems

When someone has difficulty making decisions, this often leads to practical problems.

Specific issues can include:

• **Difficulty getting to the shops or to socialise**, which can lead to a poorer diet, less exercise, smoking, drinking too much alcohol, isolation and loneliness.

• **Problems communicating with healthcare staff**. GPs, dentists or other healthcare staff may not know the person’s needs if they have not met them before or the person has not had an appointment for a long time. They may have trouble expressing or describing their symptoms or how they are feeling, which can cause confusion or errors of judgement by the health professionals.

• All healthcare professionals are trained to be aware of issues with mental capacity, so they should use their skills and take the necessary time when speaking with the patient.

• If there are problems contact the Patient Advice and Support Service through your local Citizens Advice Bureau or see their website [www.patientadvicescotland.org.uk](http://www.patientadvicescotland.org.uk). You can also call NHS Inform on 0800 22 44 88.
• **Raising concerns about care services.** This can be challenging if someone finds it hard to speak for themselves, whether they are living in their own home or in a care home. If issues arise – such as carers not turning up, poor care or inadequate communication – these problems are less likely to be flagged with the right people. Phone the **Age Scotland helpline** on **0800 12 44 222** for more information and individual advice.

• **The risk of trusting the wrong people.** This could be doorstep sellers, scammers – via the telephone, online or mail – or companies that influence someone to buy products or services they do not need or cannot afford. If you think this may have happened to someone you know, call the **Age Scotland helpline** for advice about your options.
What does the law say about mental capacity?

In Scotland, when somebody becomes incapable of managing their finances or making decisions about their welfare, the Adults with Incapacity (Scotland) Act 2000 provides protection for them. The Act was created to safeguard people who have lost the capacity or the ability to communicate, along with those who want to help them.
The Act states that a person may lack ‘mental capacity’ if they are unable to:

• act on decisions, or
• make decisions, or
• communicate decisions, or
• understand decisions, or
• remember decisions (technically ‘retaining memory of decisions’).

Every effort should be made to help someone accomplish each of the above to the best of their ability.

Someone may not have the capacity to carry out some tasks or make complex decisions about their finances or welfare but they may still have the capacity to make everyday decisions about what to eat, what to wear and who they want to spend time with.

Other legislation which protects people with incapacity includes:

**The Adult Support and Protection (Scotland) Act 2007**
which was introduced to identify and protect people who are ‘adults at risk’. The Act aims to achieve a balance between respecting someone’s rights and supporting and protecting them where necessary.

**The Mental Health (Care and Treatment) (Scotland) Act 2003**
which sets out how someone can be given treatment if they have a mental illness, a learning disability or a personality disorder. It also sets out what a person’s rights are in these situations.
How the law works in practice

Mental capacity is not a straightforward concept. Lots of factors have to be taken into account such as whether the person is at risk, as each individual case and person is different.

The ‘right thing’ to do for one person, may not be the best way forward for someone else.

The five key principles of the Adults with Incapacity (Scotland) Act 2000 are used by professionals such as doctors and social workers, as well as people who have been granted Power of Attorney, to help them make sure that all decisions made are in the person’s best interests. The principles also act as a guide for anyone who is involved in the life of someone who may need support.
The principles are:

1. **Any action taken must benefit the person and must be necessary.**

   This might seem obvious, but it can be hard to know whether making a particular decision will benefit someone or not. Is the person’s health a concern? Have they always lived the way they do and would wish to continue that way, or has there been a change?

   *Sheena has been helping her uncle Robert out for a while with his money. He finds it hard to get to the bank to pay his bills so she goes with him and sometimes takes money out of the bank for him. Robert is also starting to find it difficult to budget. Sheena is worried that if she cannot help him one week he will go without money to buy food and essentials.*

   **Options:** If her uncle has full mental capacity, he could set up direct debits or standing orders himself so he doesn’t have to go to the bank to pay his bills. If he needs help with his finances he could grant someone he trusts Power of Attorney. Robert could benefit from this help if, for example, his Attorney moves his savings into an account which pays interest.

2. **The wishes of the person must be taken into account.**

   The person should always be encouraged to express what they think and to take part in discussions about their life, and their past wishes must be considered too. The way they lived before their capacity became an issue is key. Did they always have a very relaxed approach to life or did they like things done in a certain way? What is important to them?
Everyone has their own preferences about how they want to live. This could include their choices about:

- Clothing
- Food
- Religious beliefs
- Personal appearance
- Spending time with other people, or spending time alone

The option taken should always be the least restrictive one which has the desired effect.

Any decision should aim to preserve the person’s freedom and independence as much as possible. Changes to environment or routine can have a negative impact on someone’s quality of life.

Sarah is worried about her mother who is 83, lives alone in Glasgow and used to be very house proud and took great pride in her appearance. However, nowadays whenever she goes to visit she is wearing the same unclean dress for many days and her dog is always whining to get out.

Sarah wants to look into care home places near where she lives in the Highlands and has contacted the social work department.

Highland social work department suggest that Sarah should contact Glasgow social work department and ask for an assessment of her mother’s care needs.

If her mother still has the ability to make decisions for herself Glasgow council will need her consent to assess her needs; the council may assess that her needs can best be met by carers coming into her home, not by moving into a care home.

Her mother may not want to go into a care home or move far away from the area where she lives.
Other relevant people must be consulted before a decision is made.

The person’s carer and nearest relative must be consulted about decisions if this is practical.

The person must be encouraged to use their own skills and develop new skills where possible.

When someone finds it difficult to communicate or understand something, they should be supported to use their abilities as much as possible. If expressing the spoken word is difficult, could learning to use a computer or drawing help?
Worried about someone else?
**How can you help?**

If you have concerns about someone who you think may be having problems with mental capacity, the best place to start is to simply talk to them about it. You could ask them how they are and if there is anything that want to talk to you about.

*David is concerned for his 83 year old neighbour as every day when he speaks to him at the garden fence the neighbour appears to have no memory of the conversation they had the day before.*

After speaking with them, consider what you could do to help.

- If you are not closely involved with the person yourself, speak to someone who is - such as their family, friends or carer. By explaining your concerns you may find out whether steps have already been taken to help.

- Get in touch with the person’s local social work department and explain your concerns.

- Phone their GP. If you are worried about their health it is important to make someone aware, ideally the GP who will know their medical background best. They will not be able to tell you anything about their patient but they can listen and act if needed.

- If you think the person may be at risk of harm, Contact their local social work department, or the police if they are in immediate danger.
Communication

If someone has the capacity to make their own decisions, but has difficulty communicating, there are ways to try to help communication easier for them. These suggestions are taken from the guidance for people who have Power of Attorney in Scotland.

If the person has a specific medical condition, there may be expert advice available about ways of communicating effectively from the relevant specialist charity.
**Arrangements that can be put in place to provide help and support Power of Attorney**

Power of Attorney can be granted by people who have mental capacity. It is a legal document which gives someone else the authority to make specific decisions about someone’s life if they need help or lose the ability to make decisions for themselves.

If it is not in place before someone loses capacity the chance for them to legally state their wishes has gone. See Age Scotland’s *Guide to Power of Attorney in Scotland* for more information.

**Types of informal arrangements**

There are limited options available for people who want to help in a less formal way with someone’s money. For more information, see Age Scotland’s factsheet *Ways you can help someone else manage their money and benefits*.

**Other options for someone who has lost capacity**

If someone loses capacity and there is not anything formal in place beforehand, new legal arrangements have to be put in place to allow someone else to make decisions on a person’s behalf. These include the Access to Funds scheme, Guardianship Orders and Intervention Orders.

See Age Scotland’s factsheet *Legal options for someone who has lost capacity*. 
Useful contacts and where to find out more

**Age Scotland helpline: 0800 12 44 222**

The Age Scotland helpline provides information, friendship and advice to older people, their relatives and carers.

If you need an interpreter call 0800 12 44 222 and simply state the language you need e.g. Polish or Urdu. Stay on the line for a few minutes and the Age Scotland helpline will do the rest.

You can call us for a copy of our publications list or download copies from our website at [www.agescotland.org.uk](http://www.agescotland.org.uk).

**The Office of the Public Guardian in Scotland**

The Office of the Public Guardian in Scotland has a general function to supervise people who have been appointed to manage the financial or property affairs of adults who lack the capacity to do so themselves.

Tel: **01324 678 300**

[www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk)
Mental Welfare Commission for Scotland

The Commission protects and promotes the human rights of people with mental health problems, learning disabilities, dementia and related conditions. They do this by:

- Checking if individual care and treatment is lawful and in line with good practice.
- Empowering individuals and their carers through advice, guidance and information.
- Promoting best practice in applying mental health and incapacity law.
- Influencing legislation, policy and service development.

They operate a phone line for advice relating to practice under the Mental Health and Incapacity Acts.

Freephone: 0800 389 6809
www.mwcscot.org.uk

Social work department at your local council

Check your local telephone directory or council’s website. Alternatively, call the Age Scotland helpline.

Patient Advice and Support Service (PASS)

The Patient Advice and Support Service service is delivered through your local Citizens Advice Bureau. It is independent and provides free, confidential information, advice and support to anyone who uses the NHS in Scotland.

Citizens Advice Direct: 0808 800 9060
(for contact details of your local Citizens Advice Bureau)
www.patientadvicescotland.org.uk
Where to find out more...

As mental capacity issues depend on many different factors and are experienced differently by each individual, guidance is available about the more technical aspects from the organisations below.

The Law explained

An overview of each of the key Acts is available at the Mental Welfare Commission for Scotland website at [www.mwcscot.org.uk](http://www.mwcscot.org.uk)

**Adults with Incapacity (Scotland) Act 2000:**
**A short guide to the Act**

This covers all the key points in general terms and can be found by typing the title into the search engine. It should be the first result.

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